## IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WARREN HILL, LLC.
-------------------

Plaintiff,

No. 2:18-01228-HB

v.

SFR EQUITIES, LLC,

Defendant.

## PLAINTIFF WARREN HILL, LLC'S RESPONSE TO DEFENDANT SFR EQUITIES, LLC'S STATEMENT OF UNDISPUTED FACTS

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Dated: December 21, 2018 Counsel for Plaintiff Warren Hill, LLC

Plaintiff Warren Hill, LLC ("Warren Hill"), through its undersigned counsel, hereby responds to the Statement of alleged Undisputed Facts that Defendant SFR Equities, LLC ("SFR") filed in support of its Motion for Partial Summary Judgment. The Court's policies do not expressly call for a separate Statement of Facts, which SFR nevertheless filed in connection with its Motion. In an effort to preserve its rights, and to avoid any impression that SFR's Statement of Facts is "undisputed" for purposes of Rule 56, Warren Hill has prepared the following responses with specific citation to the record.<sup>1</sup>

## RESPONSE TO SFR'S STATEMENT OF ALLEGED FACTS

1.	
RESI	PONSE: Admitted.
2.	

RESPONSE: Admitted in part; disputed in part. Warren Hill admits that AHG created SFR to serve as the entity that purchased Warren Hill's interest in Vendor Assistance Program, LLC. Discovery is ongoing and Warren Hill lacks knowledge concerning, and therefore disputes, whether have been created to manage companies that are not relevant to this case.

<sup>&</sup>lt;sup>1</sup> Warren Hill reviewed the Court's published decisions in connection with responding to SFR's separately filed Statement of Facts. Warren Hill located only a few such decisions where the Court appeared to consider a separate factual statement and corresponding response. *See A.G. v. Lower Merion Sch. Dist.*, 2012 U.S. Dist. LEXIS 140250, at \*26 n.10 (E.D. Pa. Sep. 28, 2012); *Hlywiak v. AMTRAK*, 223 F. Supp. 3d 395, 396 n.2 (E.D. Pa. 2016); *Blunt v. Lower Merion Sch. Dist.*, 826 F. Supp. 2d 749, 752 n.1 (E.D. Pa. 2011). While these cases appear to represent the minority of the Court's summary judgment opinions, Warren Hill wanted to provide an appropriate response to SFR's statement for the Court's consideration.

3.	
RES	PONSE: Admitted in part; disputed in part.
	(See Ex. 1, Member Interest Purchase Agreement at C
aranty of	payment to Warren Hill of \$1 million signed by Mr. Ginsburg, not Mr. Harris).)
s stage, the	erefore, Warren Hill disputes
.2	
4.	
RESI	PONSE: Admitted in part; disputed in part. By way of further response: (1)
	agrees that VAP is a specialty finance company; (2)
and (	(3) while Warren Hill was unaware at the time

(see Ex. 5, Harris Dep. at 58:2-59:24.) Warren Hill lacks knowledge
concerning, and therefore disputes,
Discovery is ongoing in this case, and Warren Hill will supplement this response if/when new
documents or testimony address the issue.
5.
RESPONSE: Admitted.
6.
<b>RESPONSE:</b> Admitted in part; disputed in part. Warren Hill admits that negotiations
between the parties began in 2015 and continued until February 2016. Warren Hill further
admits that it was represented by Mr. Delaney and counsel in connection with the negotiations.
Warren Hill admits that the negotiations resulted in the MIPA. Warren Hill disputes that the
negotiations as the parties were negotiating. (See Ex. 2, Declaration of Jim
Delaney ("Delaney Decl.") ¶¶ 28-40 (explaining complex nature of the detailed negotiations).)
7.

**RESPONSE:** Admitted.

8.

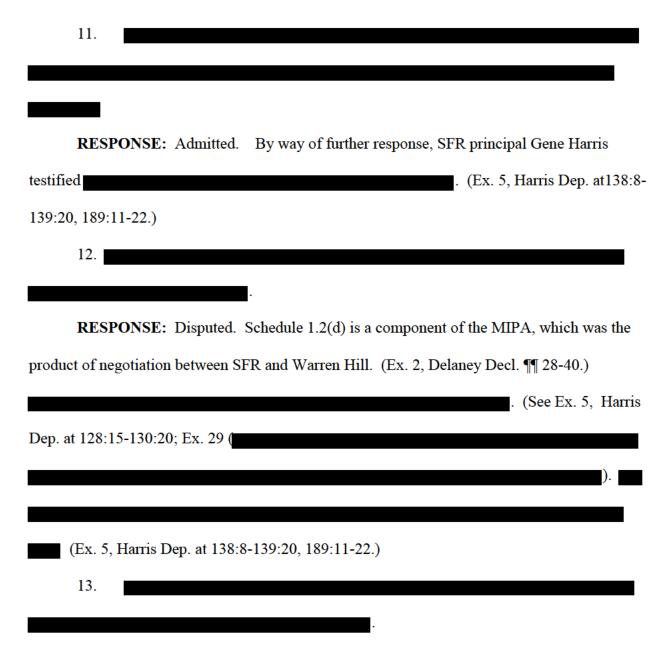
**RESPONSE:** Admitted in part; disputed in part. Warren Hill admits that the MIPA includes Section 1.2(d), which the parties have referred to as the earnout provision. Warren Hill disputes SFR's characterization of the contents of that provision. Section 1.2(d) bases the earnout payments on the definition of "Net Income", which itself is broken down into "Revenue" and "Expenses," both of which are specifically defined terms. The "Revenue" to be included in the earnout payment encompasses, inter alia, "any and all fees earned by VAP in its capacity as a manager or an administrator" of trusts relating to the business at issue and "any and all other revenues received by VAP other than the Reserve Amounts," which were separately defined and accounted for in Section 1.2(e). (See Ex. 1, MIPA at § 1.2(d)(i)(A), (D) (emphases added); compare id. to § 1.2(e) (addressing "Reserve Amounts").) Thus, the specifically negotiated definition of "Revenue," which is the backbone of the earnout provision, explicitly includes fees earned (which fees may not necessarily be paid to VAP in the form of cash until sometime after they have been earned), as well as other revenue that was received by VAP during the years in question. (See Ex. 1, MIPA at  $\S 1.2(d)(i)(A)$ , (D).)

9.

**RESPONSE:** Admitted.

10.

**RESPONSE:** Admitted.



RESPONSE: Disputed. SFR has misquoted Schedule 1.2(d) in a material way. The actual Schedule reads "Income 'when received'" and "Expenses 'when paid." (Emphasis added to denote phrases actually in quotation marks.) As set forth in Warren Hill's responsive brief, this is a factually and legally significant distinction, as the placement of the quotation marks signifies that the terms "when received" and "when paid" carry a specific connotation under the terms of the agreement. (See Warren Hill Br. at Argument § II.B.) Moreover,

Schedule 1.2(d) is not calculated on a "cash" basis—rather, Section 1.2(d) features a formula that is a hybrid of accrual-based and cash-based elements. (*See* Warren Hill Br. at Argument § I.A-C (detailing relevant terms of MIPA, including Schedule 1.2(d).)

14.

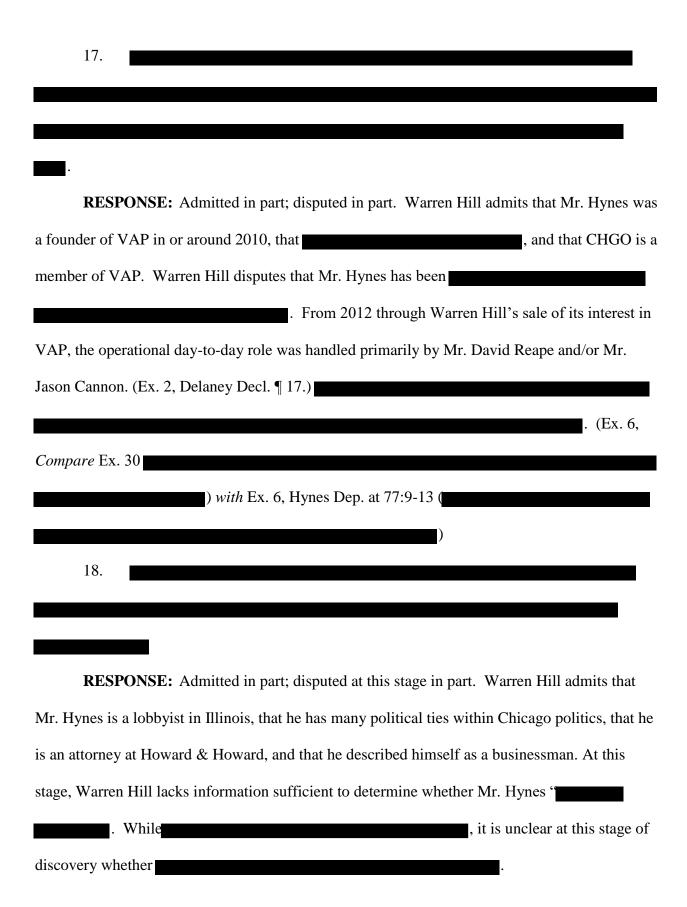
**RESPONSE:** Disputed. In the run-up to the first earnout payment, Warren Hill sought information about VAP's financial performance from Mr. Reape, who provided Warren Hill with a limited amount of information. (Ex. 2, Delaney Decl. ¶¶ 41-42.) Mr. Reape subsequently informed Warren Hill that his business partners were upset with him for having shared that information. (Id. ¶ 44.) Warren Hill used that limited information to create a spreadsheet relating to 2016 and shared that spreadsheet with SFR. (Id. ¶ 43.) When SFR responded to the spreadsheet, it provided comments relating to expenses that it planned to deduct when calculating the first earnout payment, but SFR did not supplement the spreadsheet with VAP's earned fees to the extent they were not already listed in the spreadsheet. (Id. ¶ 45.) During the following weeks, SFR and Warren Hill corresponded about SFR's stated intentions (from which it ultimately relented) to take ineligible deductions for amounts relating to purported expenses that were not permitted to be included in the earnout calculation. (Id.  $\P$  47.) At no time during this correspondence did Warren Hill ever agree that earned but unpaid fees would be excluded from "Revenue", as defined in Section 1.2(d), or that the formula set forth in Section 1.2(d), which includes both cash and accrual concepts, was instead calculable on a strictly cash accounting basis. (Id. ¶ 35-40.)

Warren Hill further disputes that SFR based the earnout on "cash income,"
(Compare Ex. 23 with Ex. 8,
; Ex. 3, Reape Dep. at 170:18-173:13 (  see also id. at 154:7-159:20 (
.)
RESPONSE: Disputed. Warren Hill incorporates its response to Paragraph 14 as thou
set forth fully herein.
16.
<b>RESPONSE:</b> Disputed. Warren Hill incorporates its response to Paragraph 14 as thou
set forth fully herein. By way of further response, the operating expenses used to calculate the

2016 earnout were based on the predefined, fixed operating expense allowances set forth in

1.2(d)(ii)(A)-(B).)

Section 1.2(d)(ii), not on VAP's actual cash operating expenses . (Ex. 1, MIPA §

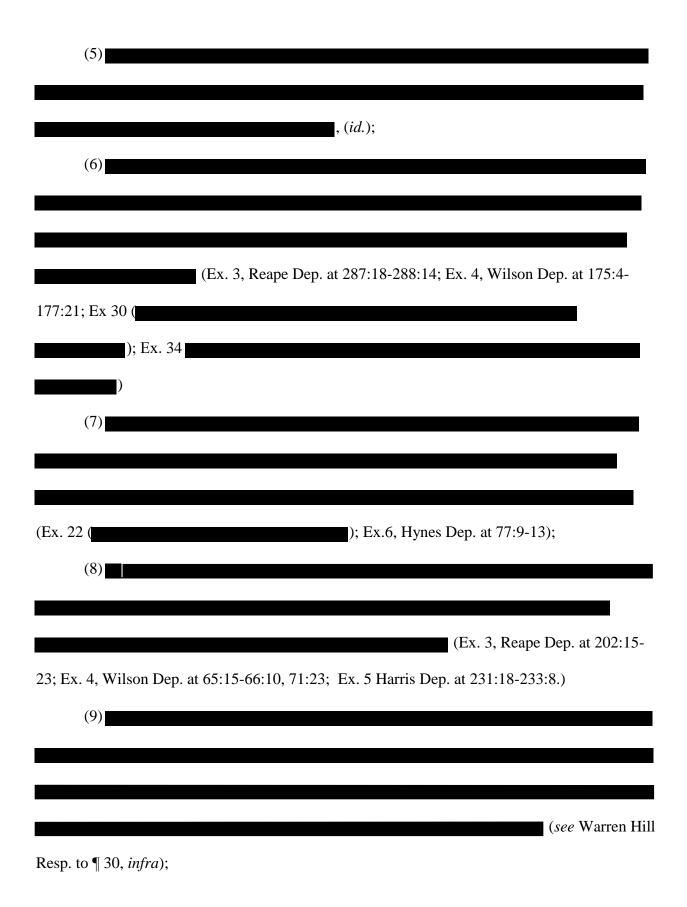


RESPO	NSE: Admitted in part; disputed in part. Warren Hill admits that	
Warren l	Hill disputes that	
. (Ex	x. 5, Harris Dep. at 67:13-21.)	
	(Id.) . (Id. at 68:5-8.)	
	. ( <i>Id.</i> at 68:9-17; Ex. 31,	
	. (Ex. 5, Harris Dep. at 68:18-21.)	

	Mr. Harri	is conceded that		." (
Harris Dep.	at 69:12-70:19.)			
20.				
RESP	<b>DNSE:</b> Admitted in	part; disputed in par	t, including as to the	legal conclusions
		n part; disputed in par		legal conclusions
	<b>ONSE:</b> Admitted in the alleged "fact."		t, including as to the	legal conclusions
				legal conclusions
nbedded in t	ne alleged "fact."			
nbedded in t	ne alleged "fact."			
ibedded in t	ne alleged "fact."		nerefore disputes, the	timing of when
nbedded in t	ne alleged "fact."	lge concerning, and th	nerefore disputes, the	
bedded in t	Hill lacks knowled	lge concerning, and th	nerefore disputes, the  . There is no	timing of when contemporaneou

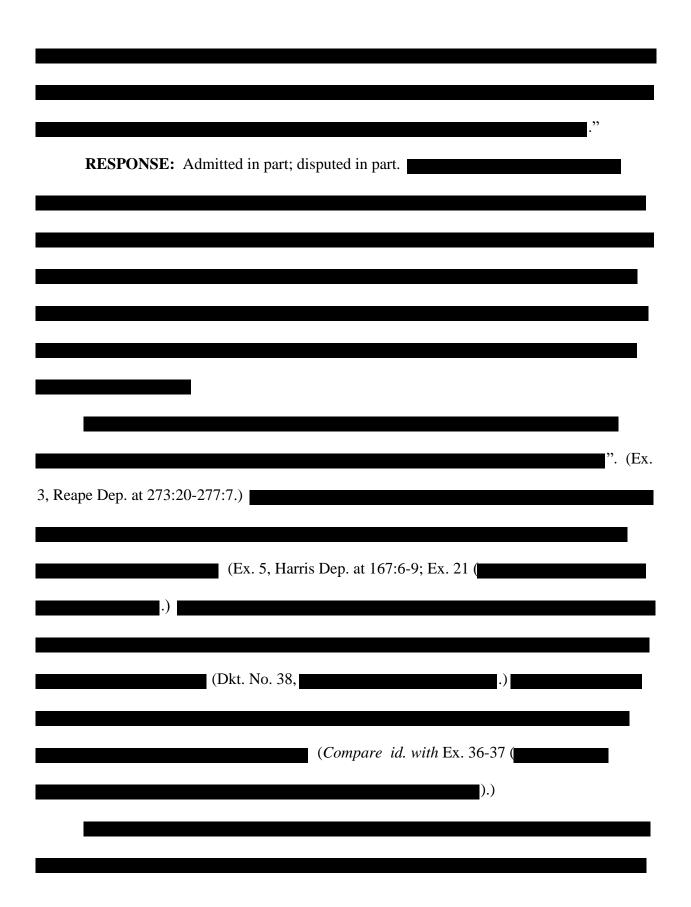
(See Ex. 3, Reape Dep. at 214:6-215:9; see also Ex. 33
21.
RESPONSE: Disputed, including as to the legal conclusions contained therein ( <i>i.e.</i> , the conclusion that
As to the first point, the new risk retention requirements did not, as a matter of law, and SFR proffers no argument in
its Statement of Facts or Memorandum of Law to suggest otherwise.
. (See,
e.g., SFR's Motion at Mr. Hynes Declaration at Ex. F,

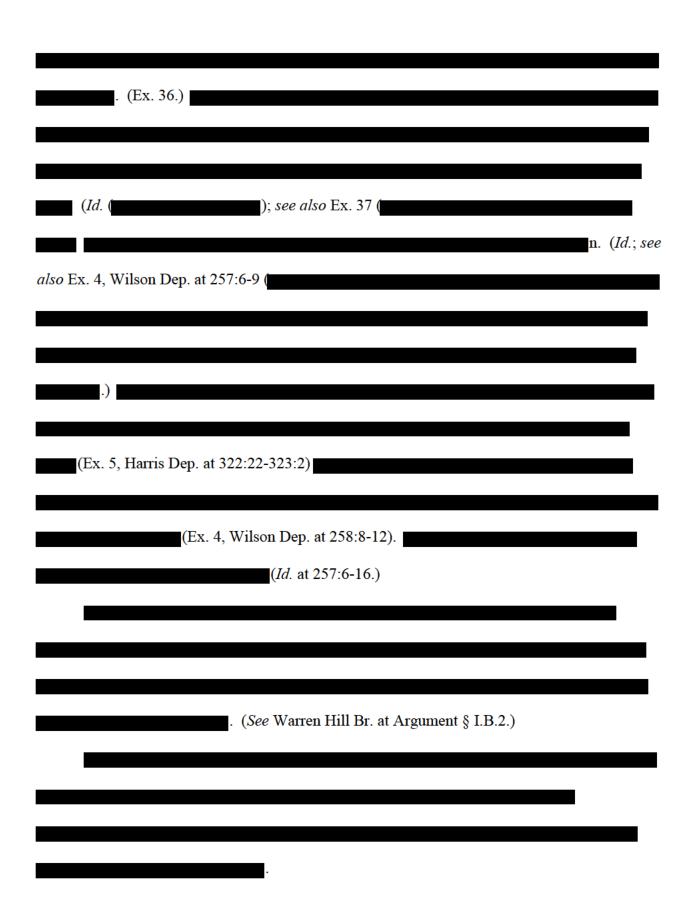
As to the second point, Warren Hill has adduced substantial evidence already (even
though discovery is still ongoing) to show that
. Specifically:
(1)
) (See Ex. 5, Harris Dep. at 197:10-17, 199:23-200:1; Ex. 3, Reape Dep. at 210:16-
211:16.)
(2)
(Ex. 5, Harris Dep. at 197:10-25; <i>see also</i> Ex. 31,
);
(3)
(Ex. 21 (
); Ex. 30 (same));
(4)
(Ex. 21 (
\).



(10)
(Ex. 3, Reape Dep. at 136:15-20); and
(11)
(Ex. 27,
Discovery is still ongoing, and additional documents have been sought from SFR that
Warren Hill expects will further confirm that
·
22.
DESPONSE. Admitted Dryway of forther response
RESPONSE: Admitted. By way of further response,
(Ex. 2, Delaney Decl. ¶¶ 41-42
23.
RESPONSE: Admitted in part; disputed in part.

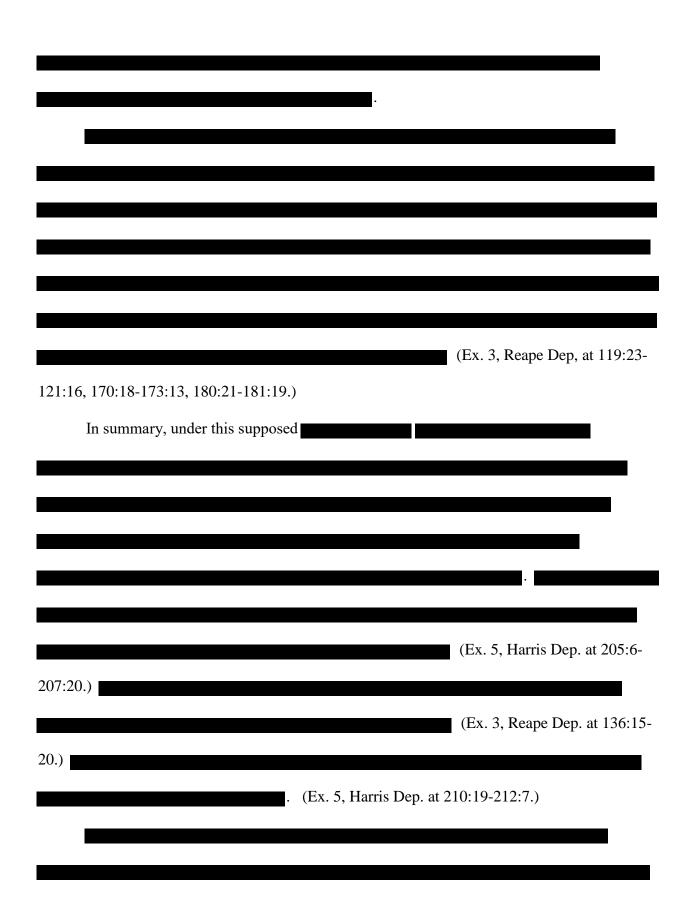
	(See Warren Hill Br. at Argument § I.C).
24.	
DECDO	NCT - Admitted in month disputed in month
KESPO.	NSE: Admitted in part; disputed in part.  . Warren
Hill disputes tha	<u> </u>
in its responses	to Paragraphs 21- 23 and 30, which responses Warren Hill incorporates herein.
25.	
DECDO	NOTE A locate 1 in most 1 in most
RESPO	NSE: Admitted in part; disputed in part.  . Warren Hill disputes that
	, for the reasons Warren Hill articulates in its responses to
Paragraphs 21-2	23, and 30, which responses Warren Hill incorporates herein.

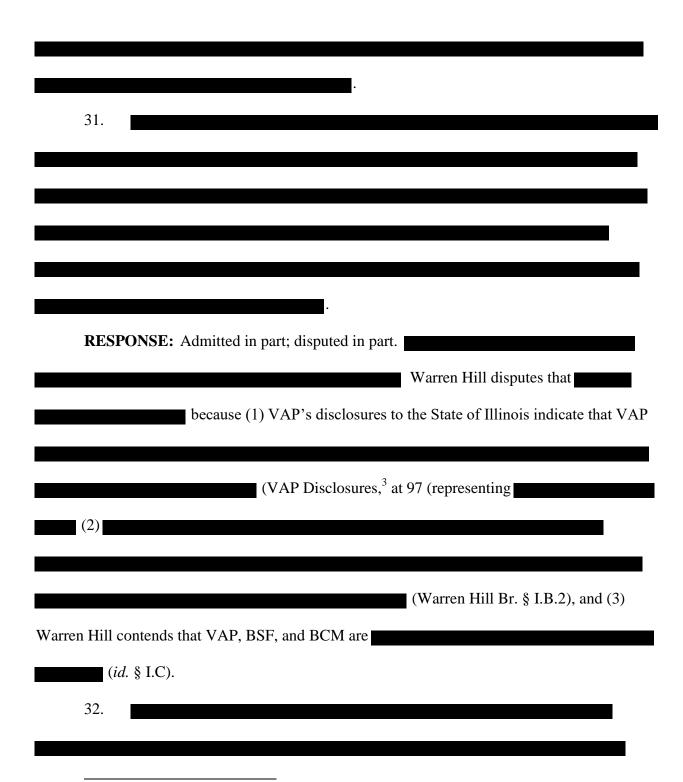




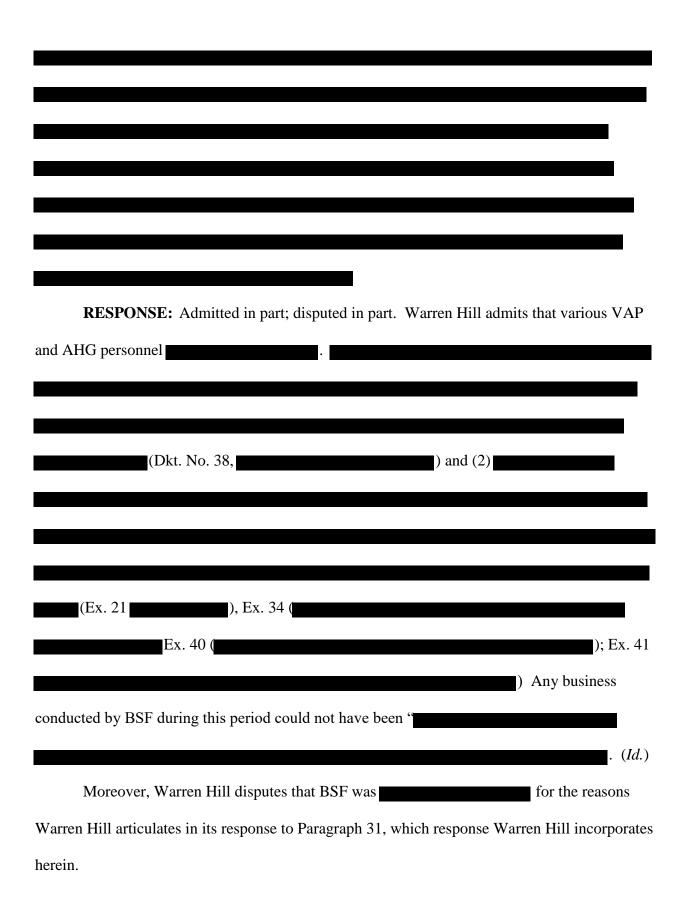
27.				
RESPO	NSE: Admitted in	n part; disputed i	n part.	
	(Co. Women I			
28.	(See Warren H	iiii Br. § I.C.)		
20.				
				."
RESPO	NSE: Admitted.			
29.				

	(see Warren Hill Br. at
3.3) and bed 30.	cause of the of VAP and BCM (id. at § I.C).
RESP	PONSE: Admitted in part; disputed in part. Warren Hill admits that
	alter SFR's obligations under the MIPA





<sup>&</sup>lt;sup>3</sup> These disclosures were used as Warren Hill Deposition Exhibits 96 and 97, but due to their volume, Warren Hill directs the Court to the online version. (Ex. 5, Harris Dep. at 100:22-101:17); Illinois Comptroller Website, VAP Disclosures, *available at* <a href="https://illinoiscomptroller.gov/comptroller/assets/File/QualifiedPurchaserMonthlyReports/2018/October/VendorAssistanceProgramLLC October%202018.pdf">https://illinoiscomptroller.gov/comptroller/assets/File/QualifiedPurchaserMonthlyReports/2018/October/VendorAssistanceProgramLLC October%202018.pdf</a>. Warren Hill will provide a hard copy if the Court would prefer.



. (Ex. 3, Reape Dep, at 119:23-121:16, 170:18-173:13, 180:21-181:19.)
In addition, Warren Hill disputes that "
for the reasons Warren Hill articulates in its response to Paras. 21- 23, and 30,
which responses Warren Hill incorporates herein.
33.
·
RESPONSE: Admitted in part; disputed in part. Warren Hill admits that BSF and BCM
were each formed as limited liability companies. Warren Hill lacks knowledge concerning, and
therefore disputes,
34.
·
<b>RESPONSE:</b> Admitted in part; disputed in part.
which payment SFR claims to represent the
2017 earn out.
. Warren Hill disputes the sufficiency of
such payment under the terms of the MIPA as well as the methods by which SFR apparently
calculated such payment.

Respectfully submitted,

/s/ Gregory S. Voshell
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Dated: December 21, 2018 Counsel for Plaintiff Warren Hill, LLC

**CERTIFICATE OF SERVICE** 

The undersigned hereby certifies that, on this date, I have caused a true and correct copy

of the forgoing to be served upon each attorney of record via electronic mail, the Court's ECF

system, and U.S. mail.

/s/ Gregory S. Voshell
GREGORY S. VOSHELL

Dated: December 21, 2018